No. 2712

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

DR. PAUL OESTING, alias PAUL ALLEN,
*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF OF THE UNITED STATES OF AMERICA

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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## BRIEF OF THE UNITED STATES OF AMERICA

Paul Oesting, plaintiff in error, has appealed from the judgment of fine and imprisonment rendered in the United States District Court for the Northern District of California, First Division, after a plea of guilty, and here contends that the indictment in the said action does not charge an offense under the laws of the United States.

Plaintiff in error at no stage of the proceedings in the lower court raised any objection whatsoever to the indictment, and attempts to raise the point for the first time upon appeal. This we assert he cannot do, and we submit that there being no matter before this Court which it can review on this appeal, the writ of error of plaintiff in error should be dismissed.

Counsel for plaintiff in error have cited certain authorities in support of their contention that they have a right to raise the question of the sufficiency of the indictment for the first time in an appellate court, and while we concede that such may be, or at least may have been, the law in a few states, the preponderance of authority is opposed to such a proceeding, and even in Indiana, upon whose early decisions plaintiff in error relies, a statute enacted in 1911 has provided that objections not taken by demurrer or answer are waived; and under this statute it was held in 1914 in

*Boos* v. *State,* 181 Ind. 562 (105 N. E. 117)

that an assignment of error that an indictment does not state a public offense, is of no avail when first raised on appeal. Also see

*Atkinson* v. *State,* 33 Ind. App. 87 (70 N. E. 560).

Opposed to the position of the courts of Missouri, as shown in cases cited by plaintiff in error, is that of the court in

*Edina* v. *Beck,* 47 Mo. App. 243 (1891).

We quote:

> "This does not give the defendant a right to appeal from a judgment where there is nothing to be tried by the appellate court. * * * A defendant cannot plead guilty, and when the fine imposed is greater than he expected, try to withdraw his plea of guilty upon appeal."

And opposed to the earlier holding of the Superior Court of Arkansas in 1850 in *Fletcher* v. *State,* 12 Ark. 169, cited by plaintiff in error, is that in

*Briones* v. *State,* 105 Ark. 82 (150 S. W. 416),

decided in 1912, wherein it was held that one convicted of a criminal offense who has not challenged the form and sufficiency of the indictment below, cannot complain thereof on appeal.

In the following cases it will appear that in many states it has long been established that where no objection to the indictment has been made in the trial court, objections thereto cannot be taken for the first time on appeal.

> "Defendant should avail himself of a defect in the indictment by demurrer, motion to quash or motion in arrest of judgment. He cannot rely on an assignment of errors apparent on the indictment's face, made in a petition for appeal."
>
> *State* v. *Arthur,* 10 La. Ann. 265.
>
> Under Cr. Pract. Act, Sec. 217, providing that defendant by failure to demur to an indictment waives all defects therein except that the court has no jurisdiction of the offense, and that the indictment does not state facts constituting an offense, an objection to the indictment on the latter ground *cannot be raised for the first time on appeal.*
>
> *Ter.* v. *Garland,* 6 Mont. 14;
> *State* v. *Malish,* 15 Mont. 506.
>
> Where accused proceeds to trial upon an indictment without objection and there is evidence sufficient to sustain a conviction, he will

not be allowed on appeal, to raise a question as to the sufficiency of an indictment.

*People* v. *Moran,* 161 N. Y. 657 (57 N. E. 1120).

Defects in the manner in which an offense is charged in the information cannot be first urged on error.

*Tway* v. *State,* 7 Wyo. 74 (50 P. 188).

The sufficiency of an indictment will not be considered, where the objection was not raised by demurrer or by motions to quash or in arrest.

*Church* v. *Ter.,* 14 N. M. 226 (91 Pac. 720).

Objections to the indictment must be made in the trial court. In the absence thereof there is no error before the appellate court.

*Palmer* v. *State,* 121 Tenn. 465 (118 S. W. 1022).

An objection to the information not raised at the trial cannot be considered on a writ of error.

(1910) *McQuery* v. *People,* 48 Colo. 214 (110 Pac. 210).

The Supreme Court cannot determine in the first instance the sufficiency of an information.

(1910) *State* v. *Smart,* 118 Wyo. 436 (110 Pac. 715).

Accused having pleaded not guilty and gone to trial cannot on appeal raise the objection of uncertainty in the indictment.

*Johnson* v. *State,* 3 Ala. App. 98 (57 So. 389).

Under Crim. Proc. Act, Sec. 44, an objection to an indictment held not available when raised for the first time in a court of review.

*State* v. *Merkle,* 82 N. J. Law 172 (83 A. 186).

The sufficiency of an indictment cannot be reviewed when raised for the first time on appeal."

*Check* v. *Commonwealth,* 162 Ky. 56 (171 S. W. 998).

An assignment of error assailing the sufficiency of an indictment cannot be considered where the question is first presented on appeal.

*Pace* v. *State,* 152 Ind. 343 (1899).

"As no ruling of the court below upon the validity of the indictment was legally invoked, this court cannot consider an assignment of error based upon the failure of the trial court to rule in accordance with the contention of plaintiff in error."

*So. Exp. Co.* v. *State,* 114 Ga. 226.

A writ of error does not properly lie for matters—e. g., the insufficiency of an indictment —which could have been taken advantage of by demurrer or motion in arrest of judgment.

*Davis* v. *State,* 39 Md. 355.

Thus far, no authorities have been cited as to the law on this subject in the federal courts; the question seems not to have been raised there until quite recently. But in

*Pickett* v. *U. S.,* 216 U. S. 456; 54 L. Ed. 566, 569;

the court held that *objections to the sufficiency of an indictment cannot first be raised upon writ of error.*

This would seem to be conclusive in the present case. Furthermore, attention is called to pages 32 and 33 of the Transcript of Record herein, where, in the Order Directing Entry of Plea of "Guilty", etc., and Judgment on Plea of Guilty, it appears that defendant, when asked if he had any legal cause to show why judgment should not be pronounced against him, showed none.

We submit that there is no matter properly before this Court for its consideration, and that, therefore, the said appeal should be dismissed.

Counsel have attacked the indictment herein on the ground that it does not show that this defendant has devised a scheme or that said scheme was one to defraud or for obtaining money or property by means of false pretenses, representations or promises. They contend first that the said indictment charges not that defendant conceived the alleged scheme, but that the "corporation" conceived it, and second, that the said scheme as set forth shows on its face that it was not fraudulent.

To say that the indictment does not charge defendant, but a corporation, with having devised the scheme set forth is to do violence to the plain language thereof, for it sets forth (Tr. pp. 2, 3) "That Dr. Paul Oesting, alias Paul Allen, doing business

at 298 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, J. L. Jordan, Incorporated, and Dr. Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the 15th day of May in the year of our Lord one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California within the jurisdiction of this Court, and under the guise and name of said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud'' etc., which allegation, after we eliminate the modifying phrases and clauses, certainly directly states in unmistakable language, ''That Dr. Paul Oesting, alias Paul Allen, * * * devised a certain scheme or artifice''. Unwilling as we are to accept counsel's alternative set forth on p. 4 of their brief, we feel compelled to assert that it is not the corporation who is making the scheme.

The scheme as set forth in the indictment, and stripped of the accompanying legal verbiage is, that the defendant, under the assumed name of Dr. Jordan, should, by means of advertisements, induce certain persons named, and others to the grand jurors unknown, to communicate with him relative to real or supposed ailments, and that defendant should then by means of letters, and through the Postoffice Department, and irrespective of any

symptoms communicated to him, and even in cases where the symptoms indicated health rather than disease, and without any real knowledge of the condition of the person so induced to communicate with him, state to such person that he was afflicted with a disease which the defendant could cure, and that he would furnish treatment for such disease for a certain sum of money, and by means of such letters would induce such person to send him money for the purpose of procuring medicine and treatments skilfully and properly designed and prepared for the cure of the disease with which such person was afflicted, or had been induced by him to believe himself afflicted, which money he would fraudulently convert to his own use, and in return therefor should send to such person certain medicines of little or no value and not medicine and treatment skilfully and properly designed and prepared for the cure of such person, the defendant having no real or proper knowledge of such person's condition, or whether he was diseased or not, or whether or not such purported medicine was capable of benefiting such person, *as he well knew.*

It is contended upon demurrer to the indictment that for many reasons the foregoing scheme is not one to defraud within the meaning of Section 215 of the Criminal Code. This contention is unsupportable. When it is averred that a physician has devised a scheme to defraud by stating to one who offers himself as a patient that such person is afflicted with a disease which the physician can

cure, and this irrespective of the symptoms, and whether or not the symptoms indicate health rather than disease, and without any real knowledge of the condition of such person, and by such statement should cause and induce such person to send him money, for which he would send in return medicine of little or no value, and not medicine skilfully and properly designed and prepared for the cure of the disease with which such person was afflicted or had been induced by such physician to believe that he was afflicted, I think it clearly appears that the physician was engaged in one of the most reprehensible schemes to defraud of which the law can take cognizance.

It may indeed be quite true that medicine is not an exact science, and that there is a wide divergence of opinion even among reputable physicians as to what is the proper method of treatment for any particular disease. But this fact is beside the mark here. All such treatments contemplate at least *good faith* on the part of the physician and are not based upon a deliberate design upon his part to procure money from a person who so far as the physician knows or has reason to believe, is in sound health by stating to him that he is afflicted with a disease.

Counsel for defendant also contend that this class of cases is akin to the prosecutions in state courts for obtaining money by false pretenses, but this is not true. In

*Durland* v. *U. S.,* 161 U. S. 306 (40 L. Ed. 709),

it was contended that the statute only contemplates such cases as come within the definition of "false pretenses" at common law. But the Court, speaking by Mr. Justice Brewer, said:

> "It (the statute) includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. * * * And it would strip it of its value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a promise."

It is held in

*Brooks* v. *U. S.*, 146 Fed. 223,

that if the scheme is sufficiently outlined to show its design and adaptability to deceive, and to fairly acquaint the accused with what he is required to meet, it answers the requirement of the statute. The Court said:

> "The most successful schemes to defraud are those dressed in the garb of honesty and hedged about with all the appearance of legal and enforceable undertakings. If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take."

In *U. S.* v. *Loring,* 91 Fed. 881, the Court said:

> "The object of the law was to prevent persons having fraudulent designs on others from using the postoffice as a means of effecting such fraud. It need not in my opinion be a fraud either at

> common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money."

Although the Federal courts have interpreted Section 215 of the United States Penal Code and Section 5480 of the Revised Statutes, on which it is founded, and have defined a scheme to defraud therein referred to, innumerable times, counsel for plaintiff in error seem not to have been able to find any cases to sustain their assertion that this indictment does not set forth a scheme to defraud.

The contention of counsel on page 8 of their brief that the allegation that "Dr. Jordan was a physician" as used in the indictment (Tr. p. 2), referred to a time prior to the date of the alleged offense only, is mere quibbling. And an effort to set up that by the terms of the indictment plaintiff in error was shown to be a physician practicing in San Francisco, and qualified to treat certain diseases, is somewhat ingenious, but not founded on fact. Nowhere in the said indictment does it appear that plaintiff in error was in fact a physician, unless it is to be inferred from the use of the title "Dr." applied to him, and that is not conclusive as that title is in general applied impartially to doctors of law, of divinity, of dentistry and of veterinary science.

The indictment clearly charges that plaintiff in error intended to secure money from afflicted persons and persons who thought themselves afflicted,

by misrepresentations, and that irrespective of their symptoms, he would assume to furnish treatments and proper medicines for the cure of alleged diseases upon the payment of certain sums, then and there not knowing what the real physical condition of the said patients was, whether they were diseased or not, or whether the purported medicines and treatments were capable of benefiting said persons. Can it be honestly contended that these allegations show absence of fraud, and do not tend to "negative the honesty of the pretenses"?

The indictment and the facts in the case of *MacKenzie* v. *U. S.*, 209 Fed. 289, 290, are exactly similar to those in the case at bar. That indictment stood the test before the Circuit Court of Appeals, and was used as a model in preparing the indictment now before this Court, and a copy of the same was furnished this office. Judge McPherson in that case said that the gist of the offense was the falsity of the scheme and the knowledge on the part of defendants that the scheme was false. The learned judge quoted with approval the instructions to the jury by the lower Court:

> " * * * he told the jury that the government * * * was also charging that the defendant knew that the letters sent to him by certain witnesses for the government—* * * 'showed no condition of disease; that the defendant knew that they showed no condition of disease, but, notwithstanding that, by his correspondence or his letters he led the persons sending those

> letters to believe that they were suffering with serious disease which he could cure; that this was false; and that he knew it to be false'."

The indictment before this Court shows that the defendant *knew* and *intended* his representations to be false.

The case of *Miller* v. *United States,* 133 Fed. 337, 347, is a case in point, charging the use of the mails to defraud, and the opinion discusses at some length the matter of the allegation of intent in the indictment.

> "Finally it is seriously argued that the indictment contains no adequate averment that the defendants ever had any intention to defraud anyone, and the case of *United States* v. *Post* (D. C.) 113 Fed. 852, is cited in support of this proposition. The alleged facts in that case bear so little analogy to those here presented that the opinion in it is neither controlling nor persuasive. * * * These allegations adequately disclose an intention on the part of the defendants to defraud the members of this corporation. They could not have committed the acts which they agreed to devise and to do without despoiling them. Everyone is presumed to intend the natural and inevitable consequence of his acts. The defendants could not have agreed to do these acts, the patent consequence of which was to defraud the members of this corporation, without intending to defraud them. The objection that the indictment does not adequately show the intention of the defendants to defraud the members of the insurance company cannot be sustained."

In *Lemon* v. *United States,* 164 Fed. 953, 957, it is stated that the intent need not be pleaded with particularity.

> "The averments of the indictment thus epitomized disclose a scheme or artifice well designed and adapted to deceive, and describe it with sufficient certainty to show its existence and character and to fairly acquaint the accused with what they were required to meet. *Such, without the certainty and particularity required in describing a substantive offense in a criminal charge, is all that is necessary in stating the first element of the offense denounced by Section 5480. Brooks* v. *United States,* 76 C. C. A. 581; 146 Fed. 223."

Other authorities which go to sustain the sufficiency of the allegations in the indictment to set forth a scheme to defraud, within Section 215 of the Criminal Code of the United States, follow.

In *U. S.* v. *White,* 150 Fed. 379, 390, the Court in instructing the jury said:

> "The point which you are to consider and determine is, not whether it is possible that the things which the defendant promised to do could be done by anyone, but whether it has been proven to you that this defendant did not *intend* to do what he promised he could and would do."

It is not necessary that the scheme should be fraudulent on its face; though it is apparently a legitimate business, it is within the statute if there was an intention not to conduct such business honestly, but to use it to defraud.

*McConkey* v. *U. S.,* 171 Fed. 829.

Such scheme may be found in any plan to get money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and this deception may be by implication as well as by express words.

*Harrison* v. *U. S.,* 200 Fed. 662.

The scheme need not be fraudulent on its face; it is only necessary that it involve some plausible device reasonably calculated to deceive.

*U. S.* v. *Young,* 215 Fed. 267, citing *Rumble* v. *U. S.,* 143 Fed. 722.

> "It seems to be well established that, where a plan discloses any scheme to defraud by which it is sought to obtain the goods of another by false representations as to the thing they are to receive in return for their property, it renders such person liable to indictment under this statute."
>
> *Charles* v. *U. S.,* 213 Fed. 707, 712.

Counsel's discussion on page 12 and the following pages of their brief of the possibility that the kind of healing that plaintiff in error intended to give his prospective patients was mental rather than physical, may have merit as a medical treatise, but is beside the question here. Furthermore, it is charged in the indictment (Tr. p. 5) that said Dr. Paul Oesting had "no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not

said purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Paul Oesting, alias Paul Allen, then and there well knew."

While it may be true that, as counsel say on page 13 of their brief, that "It is common knowledge that people consult a physician complaining of an ailment, who on examination show no physical symptoms of disease, and yet the physician, in the proper and honest discharge of his duties, will agree with the patient and prescribe for him, giving him some harmless medicine and a great deal of encouragement, otherwise the person treated might work himself into serious condition," a reference to the letters set forth in the indictment, the mailing of which is not denied, shows that they were not particularly well calculated to furnish "a great deal of encouragement."

We respectfully submit that the indictment herein is amply sufficient as setting forth a violation of Section 215 of the Criminal Code of the United States, and that even if this Honorable Court should be of the opinion that the assignments of error made by plaintiff in error here are properly before it for consideration, the judgment of the lower court should be affirmed.

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